

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DANIEL C. MONTANO; JOHN W. JACOBS,)

Counter Claimants,)

vs.)

VENTURIS THERAPEUTICS,)

Counter Defendant.)

Case No.: 2:20-cv-01410-GMN-BNW

ORDER

Pending before the Court is the Motion for Confirmation of Arbitration Award, (ECF No. 1), filed by Counter Claimants John W. Jacobs (“Jacobs”) and Daniel C. Montano (“Montano”). Counter Defendant Venturis Therapeutics, Inc. (“Cardio”)¹ filed a Response and Motion to Partially Vacate the Arbitration Award, (ECF No. 5), Montano filed a Reply and Opposition, (ECF No. 9), and Cardio filed a Reply, (ECF No. 11).

For the reasons discussed below, the Court **GRANTS in part** and **DENIES in part** Montano’s Motion to Confirm and **GRANTS in part** and **DENIES in part** Cardio’s Motion to Vacate.

I. BACKGROUND

This case concerns a dispute over Montano and Jacobs’ arbitration award of back wages against Cardio. (*See generally* Mot. Confirm. Arbitration Award (“Mot. Confirm”), ECF No. 1). Montano and Jacobs previously worked as executives for Cardio; Montano was its President and Chief Executive Officer while Jacobs served as Chief Scientific Officer and Chief Operating Officer. (*See* Final Memorandum of Award at 1, Ex. 1 to Decl. Barry Cannaday (“Cannaday Decl.”), ECF No. 6-1). On June 17, 2009, in a period of financial

¹ CardioVascular BioTherapeutics, Inc. is currently known as Venturis Therapeutics, Inc. The party is referred to as “Cardio” in this Order because it operated under the prior name during the events giving rise to this action.

1 difficulty for Cardio, Cardio's board adopted a resolution (the "2009 Resolution") offering
2 benefits to employees if they agreed to defer their compensation. (*See* 2009 Resolution, Ex. 3 to
3 Cannady Decl., ECF No. 6-3). Specifically, the board offered warrants for Cardio stock and
4 12% interest on unpaid wages in exchange for employees' continuing to work without pay until
5 after Cardio satisfied "current obligations including compensation, rent, trial costs, and other
6 ongoing operating expenses [and] vendor liabilities as needed." (*Id.*). The present dispute
7 concerns Cardio's liability to Montano for back wages owed under the 2009 Resolution.

8 While continuing to work under the 2009 Resolution, Montano filed for bankruptcy on
9 July 9, 2013. (*See* Bankr. Court Findings of Fact, Ex. 4 to Cannaday Decl., ECF No. 6-4). On
10 his bankruptcy disclosures, Montano listed \$6,645,866.20 in assets as a receivable of "unpaid
11 salary" from Cardio, 75% of which he listed as exempt from his creditors under NRS
12 21.090(1)(g). (*Id.* ¶¶ 4–5). After an evidentiary hearing, the bankruptcy court held that
13 Montano was not entitled to any of the claimed exemption comprised of interest payments
14 under the 2009 Resolution. (*Id.* ¶ 9). The court also held that Montano could not claim other
15 exemptions outside of those authorized by law, but the court did not specify other non-exempt
16 property that Montano had claimed. (*Id.*).

17 The underlying arbitration took place from August 26 to August 28, 2019, and Montano
18 and Jacobs prevailed upon counterclaims they raised for unpaid wages. (*See* Final
19 Memorandum of Award at 33–34, Ex. 1 to Cannaday Decl.). The arbitrator awarded
20 \$96,222.13 in past wages to Jacobs, plus accrued 12% interest, "but not to be paid until Cardio
21 has the necessary funds after 'taking care of current obligations including compensation, rent,
22 trial costs and ongoing operating expenses [and] vendor liabilities as needed'" pursuant to the
23 terms of the 2009 Resolution. (*Id.*). Montano received an award of \$900,000.00, representing
24 the exempt 75% of \$1,200,000.00 in recoverable unpaid wages, which the arbitrator ordered
25 Cardio to pay immediately. (*Id.*). The arbitrator reasoned that Cardio was not entitled to the

benefit of the 2009 Resolution’s forbearance provision as to Montano because Montano’s bankruptcy precluded him from recovering the 12% interest accepted in exchange for his forbearance. (*Id.*).

Montano and Jacobs initiated the present action by filing a Motion to Confirm the Arbitration Award. (*See* Mot. Confirm, ECF No. 1). Cardio then moved to vacate the award in part, only with respect to Montano. (*See* Mot. Vacate 16:18–17:16, ECF No. 1). Cardio seeks to vacate Montano’s award in full, arguing that none of the past wages are exempt property under Nevada bankruptcy law. (*Id.*). In the alternative, Cardio seeks to vacate the requirement that it pay the award immediately in contravention of the 2009 Resolution, and it seeks a deduction of \$50,000.00 from the award. (*Id.*).

II. LEGAL STANDARD

The Federal Arbitration Act (“FAA”), 9 U.S.C. § 9, provides that any party to an arbitration award may apply to the court for an order confirming the award if the parties have previously agreed to such action. Section 9 mandates that the court grant the order confirming the award unless the award is vacated, modified, or corrected, and under section 12, “[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.”

The review of arbitration awards is “extremely limited.” *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991). Courts are deferential to the decisions made by arbitrators. *Rostad & Rostad Corp. v. Inv. Mgmt. & Research, Inc.*, 923 F.2d 694, 697 (9th Cir. 1991). “An arbitrator’s decision must be upheld unless it is ‘completely irrational,’ or it constitutes a ‘manifest disregard of law.’” *Todd Shipyards Corp.*, 943 F.2d at 1060 (quoting *French v. Merrill Lynch*, 784 F.2d 902, 906 (9th Cir. 1986)).

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1 **III. DISCUSSION**

2 Cardio argues that the Court should vacate the arbitration award to Montano because the
3 arbitrator refused to consider evidence material to the controversy in violation of 9 U.S.C. §
4 10(a)(3) and exceeded his powers and manifestly disregarded the law in computing the award
5 in violation of 9 U.S.C. § 10(a)(4). (Mot. Vacate 10:1–14:24). In the alternative, Cardio argues
6 that the Court should vacate the requirement to immediately transmit the award. (*Id.* 16:24–
7 17:2).² At minimum, Cardio requests that the Court vacate \$50,000.00 of the award. (*Id.* 15:1–
8 16:16).

9 Cardio’s arguments in favor of vacating the full award flow from one central thesis: the
10 arbitrator erred in awarding Montano any back wages because the wages were not exempt
11 property in Montano’s bankruptcy proceeding and are therefore not recoverable now. (*See* Mot.
12 Vacate 7:17–14:24). The record indicates that the arbitrator considered and rejected these
13 arguments during arbitration, but Cardio now seeks another bite at the apple. Cardio’s
14 arguments fall well short of meeting the substantial burden to vacate an arbitration award.
15 With one limited exception, the Court grants confirmation of the award and denies the motion
16 to vacate for the reasons discussed below.

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20 ² Cardio argues that requiring the Montano award to be paid immediately was completely irrational because it
21 violates the terms of the 2009 Resolution and the arbitrator deferred Jacobs’s award consistent with the
22 Resolution. (Mot. Vacate 5:12–7:16). An arbitral award is “completely irrational” if it “fails to draw its essence
23 from the agreement” as evidence by the agreement’s “language and context, as well as other indicia of the
24 parties’ intentions.” *Comedy Club Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1288–89 (9th Cir. 2009); *Bosack v.*
25 *Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009). Here, the arbitrator required the award to be paid immediately
because, as consideration for deferment, Montano and Jones accepted 12% interest on their back wages, which
Montano could no longer recover after declaring bankruptcy because the interest is not exempt property. (*See*
2009 Resolution, Ex. 3 to Cannaday Decl., ECF No. 6-3); (Final Memorandum of Award, Ex. I to Mot. Confirm,
ECF No. 1). Thus, because the arbitrator considered whether the agreement after Montano’s bankruptcy
reflected the parties’ intent in light of the record, the Court cannot say the decision was “completely irrational.”
Cardio provides the Court with no legal authority suggesting that the arbitrator lacked the legal authority to reach
his conclusion. Therefore, the Court declines to vacate the requirement that Cardio pay the back wages
immediately as Cardio has not met its burden to show that the requirement is completely irrational.

1 A. The Award's Exempt Status

2 Cardio contends that the arbitrator erred by granting Montano any recovery because the
 3 2009 Resolution converted the wages owed under the agreement to proceeds thereof, which are
 4 not exempt property under Nevada bankruptcy law. (*See* Mot. Vacate 3:7–11, 7:17–14:24).
 5 Cardio first argues that the arbitrator failed to consider relevant evidence that the awarded
 6 wages are not exempt property because, despite Cardio raising the exemption issue as an
 7 affirmative defense at the outset of the arbitration and later introducing evidence thereon, “**not**
 8 **once** did the Arbitrator address, analyze, or consider, those arguments in the final Award or any
 9 of its prior iterations.” (*Id.* 11:6–7) (emphasis original). Montano responds that not only did the
 10 arbitrator cite the relevant statute in his order, but Cardio failed to brief the issue until the
 11 conclusion of the arbitration after previously conceding that the \$900,000.00 award represented
 12 the wages exempt from the bankruptcy estate. (Montano’s Reply 4:13–7:9, ECF No. 9).

13 The Court finds that the arbitrator adequately considered the evidence presented. In his
 14 thirty-three-page final order, the arbitrator summarized Cardio’s argument that because “the
 15 sums sought by Montano are not a payment for ‘personal services’ performed in the ordinary
 16 course of business, they are not exempt under NRS § 21.090(1)(g)(1).” (Final Memorandum of
 17 Award at 31, Ex. I to Mot. Confirm, ECF No. 1). Rejecting the argument, the arbitrator
 18 explained “the amount due to Montano is unpaid wages earned for work done in the ordinary
 19 course of Cardio’s business during its long downward spiral.” (*Id.*). In so doing, the arbitrator
 20 declined to disturb his factual finding that the award was “compensation paid or payable for
 21 personal services . . . in the regular course of business,” which is exempt from bankruptcy
 22 under NRS 21.090(1)(g). (*Id.*) (*Cf.* Cardio’s Post Arbitration Brief at 72–74, Ex. 8 to Cannaday
 23 Decl., ECF No. 6-8). While Cardio listed the non-exempt status of the wage claim as an
 24 affirmative defense, it appears Cardio did not further explain the argument until its final reply
 25 brief; nevertheless, Cardio now asserts that the arbitrator committed reversible error in his

1 treatment of the argument. (*See* Mot. Vacate 10:4–21) (highlighting the timeline of the
2 argument in the arbitration, which indicates that Montano did not develop its present argument
3 in the arbitration until its final reply brief). Contrary to Cardio’s assertions, the arbitrator’s
4 final order demonstrates that he considered whether the award qualified as exempt wages.

5 Next, Cardio argues that the arbitrator exceeded his powers and disregarded the law by
6 failing to properly consider and construe NRS 21.090(1)(g) and *in re Christensen*, 149 P.3d 40
7 (Nev. 2006), with respect to Montano’s right of recovery. (Mot. Vacate 11:11–14:24).

8 Montano responds that Cardio improperly construes the law, and even if Cardio’s interpretation
9 is correct, Cardio has not shown that the improper application of the law demonstrates that the
10 arbitrator manifestly disregarded the law. (Cardio’s Reply 7:3–11:22).

11 *i. NRS 21.090(1)(g)*

12 Under NRS 21.090(1)(g) exempt “earnings” include “compensation paid or payable for
13 personal services performed by a judgment debtor in the regular course of business . . . as
14 wages.” Only 75% of earnings are exempt property. *See* NRS 21.090(1)(g). In the final
15 arbitration order, the arbitrator mirrored the language of the statute in concluding that
16 Montano’s award of \$900,000 was for 75% of “unpaid wages earned for work done in the
17 ordinary course of Cardio’s business,” indicating that the award is for exempt earnings (Final
18 Memorandum of Award at 31, Ex. I to Mot. Confirm). The arbitrator’s conclusion that the
19 wages are earnings under the exempt property statute is not in manifest disregard for law, even
20 if the award could conceivably be construed to fit a category of non-exempt property. (*See*
21 Cardio’s Post Arbitration Brief at 72–74, Ex. 8 to Cannaday Decl.); *see also Mich. Mut. Ins.*
22 *Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995) (explaining that a decision is in
23 manifest disregard of the law only if it is “clear from the record that the arbitrator . . .
24 recognized the applicable law and then ignored it.”).

1 Cardio contends that the award does not deduct those amounts required to be withheld
2 by law; however, Cardio fails to explain any subset of the award that the arbitrator was bound
3 to exclude. (*See* Mot. Vacate 13:1–14:24). Instead, Cardio conclusorily asserts that all unpaid
4 wages must be withheld because the final bankruptcy settlement did not allow Montano to
5 recover “any wages that did not fall within the definition of exempt wages under NRS
6 21.090(1)(g).” (*Id.*). In light of the arbitrator’s finding that the award is for wages encompassed
7 in the statutory definition of exempt earnings, it was not reversible error to determine the total
8 award is exempt property under NRS 21.090(1)(g). Cardio provides little explanation why the
9 Court should hold otherwise.

10 ii. *In re Christensen*

11 The sole reasoned explanation Cardio provides is that the wages are not recoverable
12 because they are to be paid pursuant to a “contract,” the 2009 Resolution, which *in re*
13 *Christensen* demonstrates is not exempt under Nevada law. (Mot. Vacate 8:1–21, 12:3–17). *In*
14 *re Christensen* explains that proceeds of exempt earnings are exempt property “so long as [the
15 proceeds] remains subject to demand and use as the needs of the debtor for required support
16 and maintenance.” 149 P.3d at 49. Cardio argues that because the 2009 Resolution deferred
17 Montano’s right to demand wages for an indefinite period in exchange for warrants to purchase
18 Cardio stock and a right to the earnings in the future, the wages are “proceeds of exempt
19 earnings to a permanent investment” in Cardio’s future and are therefore not exempt property.
20 (*Id.*). Montano responds that not only did Cardio wait to raise this argument until its final reply
21 brief, but the 2009 Resolution did not convert the unpaid wages to proceeds of the wages.
22 (Montano Reply 9:17–11:22)

23 The Court finds that the law does not unequivocally show the award is for non-exempt
24 proceeds. *In re Christensen* is distinguishable from the facts at issue because the case does not
25 concern an agreement to defer the payment of exempt wages given for other consideration.

1 Rather, the case considers when proceeds of wages *that have already been deposited into an*
2 *account* retain their exempt status. *See in re Christensen*, 149 P.3d at 42–44 48–49. The
3 Nevada Supreme Court held the negative when the proceeds are not subject to immediate
4 demand. *Id.* However, the holding may not extend to wages deferred by contract that have not
5 yet been paid. Accordingly, Cardio has not satisfied its burden to show that the arbitrator acted
6 completely irrationally or manifestly disregarded the law.

7 **B. The \$50,000.00 Credit**

8 Cardio argues that the arbitrator erred by refusing to consider Montano’s own evidence
9 that Cardio was entitled to a \$50,000.00 credit against whatever back wages Montano
10 ultimately recovered against Cardio. (*See* Mot. Vacate 15:1–16:16); (Bankr. Court Findings of
11 Fact ¶ 28, Ex. 4 to Cannady Decl.) (explaining, “CVBT is entitled to a credit of \$50,000 on any
12 subsequent award made to Debtor related to the CVBT Receivable.”). Although there may
13 have been a colorable argument that Cardio waived the objection by failing to timely raise the
14 issue in the arbitration, Montano provides no response to the validity of Cardio’s requested
15 credit. (*See* Montano’s Reply, ECF No. 9). The arbitrator himself counseled that “[a]s for the
16 \$50,000 credit Cardio asserts it is entitled to from the bankruptcy court’s settlement order, it
17 can raise that claim at the time that Montano seeks to collect his judgment.” (Final
18 Memorandum of Award at 33, Ex. I to Mot. Confirm., ECF No. 1). Given that Montano has
19 not provided a response to the requested credit, and the evidence indicates that Montano agreed
20 to the credit, the Court grants Cardio’s request to vacate \$50,000.00 of the Montano award.

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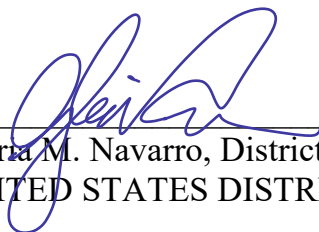
1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that the Partial Motion to Vacate the Arbitration Award,
3 (ECF No. 5), is **GRANTED in part** and **DENIED in part**. The Court **VACATES** \$50,000.00
4 of the arbitral award to Montano. The remaining \$850,000.00 awarded to Montano is
5 confirmed and due immediately.

6 **IT IS FURTHER ORDERED** that the Motion for Confirmation of Arbitration Award,
7 (ECF No. 1), is **GRANTED in part** and **DENIED in part** consistent with the foregoing.

8 The Clerk of Court shall enter judgment and close the case.

9 Dated this 25 day of January, 2021.

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14 Gloria M. Navarro, District Judge
15 UNITED STATES DISTRICT COURT
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